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11
12 IN THE UNITED STATES DISTRICT COURT
13
14 WESTERN DISTRICT OF WASHINGTON
15
16 AT SEATTLE

ELAINE FOSMIRE,

CV No.: 3:10-CV-05291-JLR

Plaintiff,

vs.

PROGRESSIVE MAX INSURANCE
COMPANY; PROGRESSIVE
CASUALTY INSURANCE COMPANY;
PROGRESSIVE DIRECT INSURANCE
CO.; PROGRESSIVE CORPORATION,

**DEFENDANT'S REPLY IN SUPPORT
OF MOTION TO EXCLUDE THE
EXPERT REPORT OF NAYAK L.
POLISSAR, PH.D. IN SUPPORT OF
CLASS CERTIFICATION**

NOTE ON MOTION CALENDAR:
Friday, April 22, 2011

Defendants.

I. **The Court should strike Dr. Polissar's April 18, 2011 Declaration.**

Defendant Progressive Max moves to strike the Declaration of Nayak L Polissar, Ph.D. in Opposition to Defendant's Motion to Exclude Expert Report (the "Supplemental Polissar Report," Dkt. #96) as an untimely and unpermitted supplemental expert report.

**DEFENDANT'S REPLY IN SUPPORT OF MOTION TO EXCLUDE
THE EXPERT REPORT OF NAYAK L. POLISSAR, PH.D. IN
SUPPORT OF CLASS CERTIFICATION - 1**

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1 The schedule required Plaintiff to disclose her expert reports by November 19, 2010.
 2 (8/31/10 Preliminary Scheduling Order, Dkt. #41). Plaintiff timely served the original
 3 Polissar Report, but did not disclose all materials relied upon by Dr. Polissar before his
 4 November 30, 2010 deposition, and continued to produce materials during and after the
 5 deposition. (Donohue Decl. at ¶ 6, Dkt. #88.) Plaintiff now submits the Supplemental
 6 Polissar Report attempting to cure defects in the original Polissar Report and straighten out
 7 Polissar's troublesome deposition testimony by making wide-ranging assertions that
 8 Progressive Max can test by cross-examination.

9 Although the Supplemental Polissar Report is twice as long as the original, plaintiff
 10 only cites a fraction of its content. If the Court does not strike the supplemental declaration,
 11 it should ignore paragraphs that plaintiff does not cite. Defendant's reply focuses only those
 12 portions of the Supplemental Polissar Report that plaintiff actually cites.

13 **II. Polissar's new opinion is still not based upon Progressive Max's data.**

14 In her opposition, plaintiff states that she offers Polissar's testimony to "show that a
 15 regression modeling formula can be derived from existing information to estimate an
 16 aggregate damage award . . ." (Pl.'s Opp. at 4:4, 9-10, Dkt. #94.) Plaintiff concedes that she
 17 must submit scientifically reliable evidence to support this opinion (Pl.'s Opp. at 2:2, Dkt.
 18 #94.) The question presented by Progressive Max's Motion to Exclude is whether the
 19 original Polissar Report should be regarded as scientifically reliable evidence. Progressive
 20 Max has demonstrated that the original Polissar Report does not establish such reliability.

21 The most obvious shortcoming in Polissar's testimony, even as supplemented, arises
 22 from his failure to examine or analyze the "existing information," from which the modeling
 23 formula must be derived. First, Polissar knows nothing about the Progressive Max data. In
 24 its Motion to Exclude, Progressive Max demonstrated that because Polissar had never looked
 25 at Progressive Max's data, Polissar's opinion could not reliably support plaintiff's statement
 26 that "the amount of their individual and aggregate class-wide damages can be calculated

1 using available, objective information contained in Progressive's own electronic records."

2 (Pl.'s Mot. for Class Cert. at 16:18-20, Dkt. #64.)

3 Since October 10, 2010, plaintiff has had Progressive Max's electronic records
 4 relating to UMPD claims paid to its insureds during the class period. (Def.'s Motion to
 5 Exclude at 4:6-8, Dkt. #87). Polissar, however, still has not reviewed that data. (Polissar
 6 Decl., ¶ 10, Dkt. #96.) Polissar does not know if the Progressive Max data will have
 7 variables similar to those in the Siskin Data. (Polissar Decl. ¶ 11, Dkt. #96.) The original
 8 Polissar Report states that the result of his analysis "is a formula that relates the values of the
 9 predictive variables (such as make, model, age of car, mileage and type and extent of
 10 damage) to the diminished value of the car." (Expert Report, p 3, ¶ 8, Ex. F, Dkt. #64-1.) But
 11 without examining the Progressive Max data, Polissar cannot (and does not) testify that the
 12 Progressive Max data contains "values of the predictive variables."

13 The examination of the Progressive Max data would have been a simple task.
 14 Instead, Polissar guesses that the data must contain information that will allow him to obtain
 15 variables needed for his model because "Dr. Siskin has previously carried out a successful
 16 exercise of using insurance company files to obtain variables needed for his model * * *
 17 [and] it [is] highly likely that the same will be possible using data provided by Progressive.
 18 (*Id.*)." Accordingly, Polissar assumes that Progressive Max (as an insurance company)
 19 would keep data necessary to derive the formula. (Polissar Decl. ¶ 11, Dkt. #96.)

20 Polissar also has not done any work to determine how to account for differences
 21 between the Progressive data and the Siskin Data. Polissar simply states that if the
 22 information is different, he will develop a model using the Siskin Data based on the variables
 23 available from the Progressive data. (Polissar Decl. ¶ 11, Dkt. #96.) However, because he
 24 has not yet analyzed the Progressive data, Polissar cannot explain how he will use it to
 25 reliably estimate class-wide and individual diminished value "using available, objective
 26 information contained in Progressive's own electronic records." Polissar's assumptions
 about the content of Progressive data do not amount to scientifically reliable analysis. His

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1 guess work should not be admitted into evidence or considered in evaluating the plausibility
 2 of scientifically measuring class-wide damage. Polissar's willful ignorance of the content of
 3 the Progressive data betrays doubt about the plausibility of his proposed method for
 4 measuring aggregate damage.

5 **III. Polissar's new opinion is still not based upon data relevant to the proposed class.**

6 Plaintiff apparently agrees that Polissar must eventually build a statistical model
 7 based upon data representative of the class in order to demonstrate that he can isolate the
 8 effect of diminished value for the proposed class. (Def's Mot. to Exclude at 4:22-5:13, Dkt.
 9 #87.) In effect, plaintiff tacitly concedes the defects in Polissar's opinion. The Polissar
 10 Report could not have been based on data that he concluded was representative of the class,
 11 because Polissar had never seen a description of the proposed class. (Def's Mot. to Exclude
 12 at 5:14-16, Dkt. #87). Instead of determining whether data representative of the putative
 13 class even exists, Polissar relies exclusively on the Siskin Data to render his opinion, even
 14 though the Siskin Data comes from older vehicles that differed in age, class, makes and
 15 models from the vehicles in the proposed class. It appears sufficient for Polissar's purposes
 16 that the Siskin Data involves cars sold in the USA, rather than refrigerators, telephones or
 17 boats (Polissar Decl., p. 5, ¶ 10, Dkt. #96).

18 Polissar still has not explained how he would analyze or adjust the Siskin Data to
 19 account for the different characteristics of the newer and different vehicles in the proposed
 20 class. Although plaintiff now claims that Polissar studied the Siskin Data and determined "it
 21 was appropriate for use in this case because Progressive insured vehicles and the [Siskin
 22 Data] would have a similar age range, counting age at the time of the accident or the time of
 23 the auction, respectively," plaintiff cites no evidence to support this statement. (Pl.'s Opp. to
 24 Mot. to Exclude 7:18:20, Dkt. #94.)

25 Despite never having viewed Progressive Max data, Polissar now claims that "both
 26 sets cover a broad range of vehicle types, models, makes and mileages * * * [and therefore]
 the principles of damage and their impact on sales price, and any statistical models

1 describing the same, will carry over from the auction dataset to the Progressive cars.” (Pl.’s
 2 Opp. to Mot. to Exclude at 7:20-24, Dkt. #94.) And despite not knowing the proposed class
 3 description, Polissar now claims that he will use the Siskin Data to develop a model for
 4 diminished value that “represents a wide and diverse population, a population of which the
 5 cars in the present case are a part.” (Pl.’s Opp. to Mot. to Exclude at 4:12-14, Dkt. #94.)
 6 Polissar’s Supplemental Report still does not elucidate how he can account for the many
 7 differences between the Siskin Data and the proposed class in age, make, model and class of
 8 the vehicles. Accordingly, Polissar has not demonstrated how he can reliably estimate
 9 individual and class-wide diminished value based on representative data.

10 **IV. Polissar still has not validated the Siskin Data.**

11 Plaintiff concedes that “there are well-established prohibitions against one expert
 12 adopting the opinions or data of other experts as their own without having made any effort to
 13 test their validity * * *.” (Pl.’s Opp. to Mot. to Exclude at 9:11-12, Dkt. #94.) Polissar
 14 admits he did not test the validity of the Siskin Data. (Def.’s Mot. to Exclude at 7:16-22,
 15 Dkt. #87.) Polissar’s testimony should be excluded on this basis alone.

16 **V. Polissar still has not demonstrated a reliable method for estimating diminished
 17 value for the proposed class or individuals.**

18 Plaintiff cites three cases for the proposition that she is only required to offer a
 19 proposed method for determining damages that is “not so insubstantial as to amount to no
 20 method at all.” (Pl.’s Opp. to Mot. to Exclude at 3:24-4:5, Dkt. #94.) Each of those cases
 21 demonstrates why Polissar’s report should be excluded. In *Negrete v. Allianz Life Ins. Co.*
of North Am., 238 F.R.D. 482 (C.D. Cal. 2006), the plaintiff’s expert developed software that
 22 would calculate lost damages using data available from the defendant’s records. Although
 23 the court found plaintiff’s expert used a plausible method to calculate damages, its finding
 24 relied on the facts that the expert had already “analyzed the vast majority” of the
 25 defendant’s data at issue in the case. 238 F.R.D. at 494. Here, Polissar has not even looked
 26 at Progressive’s data. Similarly, in *Online DVD Rental Antitrust Litigation*, 2010 WL

1 5396064 (N.D. Cal. 2010), the court accepted plaintiff's expert testimony when it was
 2 undisputed that his methodology was based on defendant's data. 2010 WL 5396064, at *
 3 11. The same was true in *TFT-LCD (Flat Panel) Antitrust Litigation*, 267 F.R.D. 583 at 604
 4 (N.D. Cal. 2010). None of these three cases involved an expert who had failed to even look
 5 at the defendant's data. In contrast, the court in *Somers v. Apple*, 258 F.R.D. 354 (N.D.
 6 2009), rejected the plaintiff's expert report because the expert had "not yet developed a
 7 model or worked with any data in the context of this case." 258 F.R.D. at 360. The court
 8 should reach the same conclusion here.

9 Plaintiff fabricates a straw-man argument that Progressive Max believes Polissar must
 10 have already "developed or created an actual detailed model as well as an actual specific
 11 formula for calculating damages," even at the certification stage. (Pl.'s Opp. to Mot to
 12 Exclude at 2:24-25. Dkt. #94.) In fact, defendant's challenged to Polissar's opinion uses the
 13 standard plaintiff advocates: his opinion that he can derive class-wide damages for
 14 diminished value from analysis of existing information must be supported by scientifically
 15 reliable evidence. Polissar's testimony that he is capable estimating class-wide and
 16 individual damages from existing data lacks support from scientifically reliable evidence.
 17 Polissar simply recites generic statistical principles and claims he will build a model to
 18 accomplish this task. (Mot. to Exclude at 9:11-10:3, Dkt. #87.)

19 DATED this 22nd day of April, 2011.

20 MARKOWITZ, HERBOLD, GLADE
 & MEHLHAF, P.C.

22 By: /s/ Peter H. Glade

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**DEFENDANT'S REPLY IN SUPPORT OF MOTION TO EXCLUDE
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ATTORNEY CERTIFICATE OF SERVICE

I hereby certify that on April 22, 2011, I have made service of the foregoing
**DEFENDANT'S REPLY IN SUPPORT OF MOTION TO EXCLUDE THE EXPERT
 REPORT OF NAYAK L. POLISSAR, PH.D. IN SUPPORT OF CLASS
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DATED this 22nd day of April, 2011.

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